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Invoke / Oracle  
c/o CPA Global  
900 Second Avenue South, Suite 600  
Minneapolis, MN 55402

EXAMINER
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BLOSS, STEPHANIE E

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* RAMAKRISHNA C. DHANEKULA,  
KENNY C. GROSS, and DAVID KEITH MCELFRISH

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Appeal 2017-003960  
Application 13/213,883  
Technology Center 2800

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Before TERRY J. OWENS, CHRISTOPHER L. OGDEN, and  
JENNIFER R. GUPTA, *Administrative Patent Judges*.

GUPTA, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

Appellants<sup>2</sup> appeal under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> In this decision, we refer to the Specification filed August 19, 2011 (“Spec.”), the Final Office Action mailed October 1, 2015 (“Final Act.”), the Appeal Brief filed September 20, 2016 (“Br.”), and the Examiner’s Answer mailed November 4, 2016 (“Ans.”).

<sup>2</sup> Appellants identify the real party in interest as Oracle International Corporation. Br. 2.

The subject matter on appeal relates to a method for testing functionality of multi-core processors and similar integrated circuits. Spec. ¶ 1. Claim 1, reproduced below from the Claims Appendix of the Appeal Brief, is illustrative of the claims on appeal.

1. A method, performed by a controller, of testing a multi-core processor comprising:

executing a specified set of instructions using the multi-core processor;

measuring electromagnetic energy radiated from the multi-core processor while executing the specified set of instructions;

determining, by the controller, a test node corresponding to radiated power at each of a plurality of predetermined frequencies of the radiated electromagnetic energy; and

comparing, by the controller, the test node to each of a plurality of reference nodes with each reference node corresponding to a known number of operating cores of a reference multi-core processor executing the specified set of instructions to determine a number of functional cores in the multi-core processor.

Br. 8 (Claims App'x.).

## DISCUSSION

The Examiner maintains the rejection of claims 1–20 under 35 U.S.C. § 101 because the claimed invention is directed to a judicial exception (i.e., a law of nature, a natural phenomenon, or an abstract idea) without significantly more. Final Act. 2–4.

In traversing the Examiner's rejection, Appellants argue claims 1–20 as a group. *See generally*, Appeal Br. 3–6. Accordingly, we focus our discussion on representative claim 1 in deciding this appeal. *See* 37 C.F.R. § 41.37(c)(1)(iv).

We have reviewed the ground of rejection set forth by the Examiner, Appellants' arguments, and the Examiner's response. On this record, we are unpersuaded that the Examiner erred reversibly in determining that the claims do not comply with 35 U.S.C. § 101 for the reasons set forth by the Examiner in the Final Office Action and the Examiner's Answer. We add the following.

35 U.S.C. § 101 defines the scope of patent-eligible subject matter as “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” 35 U.S.C. § 101. The Supreme Court, however, has long interpreted § 101 to include an exception: “[l]aws of nature, natural phenomena, and abstract ideas” are not patentable. *See, e.g., Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014) (“*Alice*”) (internal quotation and citation omitted). A two-step framework for determining whether claimed subject matter is judicially-excepted from patent eligibility under § 101 is set forth in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 78–79 (2012) (“*Mayo*”), and further explained in *Alice*. The first step requires determining whether the claims at issue are directed to a patent-ineligible concept, such as an abstract idea. *See Alice*, 134 S. Ct. at 2355 (citing *Mayo*, 566 U.S. at 76–77). The second step requires examining “the elements of the claim to determine whether it contains an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Alice*, 134 S. Ct. at 2357 (quoting *Mayo*, 566 U.S. at 72, 79). Claims directed to, or reciting, systems are also ineligible under § 101 if the hardware recited by the claims add nothing significantly more than the underlying abstract idea. *Alice*, 134 S. Ct. at 2360.

In this appeal, the Examiner determines that claim 1 is directed to a method of testing that measures electromagnetic energy and compares the measurement to a test node to determine a number of functional cores in a multi-core processor, which is an abstract idea. Final Act. 2. The Examiner finds that claim 1 does not include additional elements that are sufficient to amount to significantly more than the judicial exception “because the claimed execution of instructions to measure electromagnetic energy is simply a form of routine data gathering, since this is the way a sensor works, and . . . would be routine in any computer implementation, and routinely used by those of ordinary skill in the art in order to apply the correlation.” *Id.*

Appellants argue that “[t]he rejection does not identify any of the recognized abstract ideas such as being a fundamental economic practice, an idea of itself, a method of organizing activity, or a mathematical relationship/formula.” Br. 5.

Appellants’ argument is not persuasive of reversible error. In the Answer, the Examiner persuasively explains why the claims are directed to a patent-ineligible concept. Ans. 3. Specifically, the Examiner determines that the claims as a whole are directed to “a comparing of new and stored information to identify options” “which is an example of ‘an idea of itself,’ which is one of the four categories of abstract ideas specifically designated by the courts[, for example, in *Classen Immunotherapies Inc. v. Biogen IDEC*, 659 F.3d 1057 (Fed. Cir. 2011) and *SmartGene Inc. v. Advanced Biological Labs. SA*, 555 Fed. Appx. 950 (Fed. Cir. 2014),] and included in the guidance provided by the office in July of 2015.” Ans. 3; USPTO’s July 2015 Update: Subject Matter Eligibility, 5 (available at

<https://www.uspto.gov/sites/default/files/documents/ieg-july-2015-update.pdf>) (hereinafter “July 2015 Update”). Appellants did not file a Reply Brief, and thus, do not dispute the Examiner’s determination set forth in the Answer.

Appellants argue that even if the claims are directed to an abstract idea, “the claims taken as a whole clearly include elements that amount to ‘significantly more’ than the abstract idea of data gathering.” Br. 5.

Appellants’ argument is not persuasive of reversible error. The Examiner finds that “the only limitations provided in any claims that are not an example of comparing to identify options are required [routine] data gathering steps in order to perform the comparison.” Ans. 3; Final Act. 2, 4. Appellants, in response, simply reference the language of claims 1, 10, 14, and 16 (Br. 5–6), and then summarily conclude that “[t]he representative limitations identified . . . when taken as a whole in the context of the claims amount to ‘significantly more’ than the identified idea of ‘data gathering’ and do not fit into any of the categories of abstract ideas as recognized by the courts.” Br. 6. Appellants, however, provide no persuasive explanation to support the conclusion that the combination of elements recited in claim 1 amounts to “significantly more” than the abstract idea identified by the Examiner.

Appellants argue that “[e]ven assuming *arguendo* that the claims recite [an] abstract idea of ‘data gathering,’ the claims still do not tie up that abstract idea and pre-empt others from using it.” Br. 4.

Appellants’ pre-emption argument does not alter our view that claim 1 is properly rejected under § 101. Our reviewing court has expressly rejected similar contentions regarding preemption, stating that a patentee’s “attempt

to limit the breadth of the claims by showing alternative uses . . . outside of the scope of the claims does not change the conclusion that the claims are directed to patent ineligible subject matter.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). The court explained that, “[w]hile preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility. . . . Where a patent’s claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework . . . preemption concerns are fully addressed and made moot.” *Id.* In the present case, as discussed above, we are not persuaded of error in the Examiner’s finding that Appellants’ claim 1 is limited to patented ineligible subject matter under the *Mayo* framework. Thus, the fact that alternatives outside the claims are not preempted does not demonstrate patent eligibility.

#### DECISION

For the above reasons, the rejection of claims 1–20 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED